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RECOVERY OF DAMAGES FOR PERSONAL INJURY CAUSED BY FRIGHT.—With the steady increase in the volume of litigation based on personal injury, the various state courts of last resort have been constantly confronted with the question whether one can recover damages for fright and its consequences. An extensive examination of the authorities will show that the courts are in irreconcilable conflict—chiefly due to misconceived ideas of the law of negligence and proximate cause. The scope of this note will be limited to a discussion of the rules of law governing cases of fright in its narrow sense, and no attempt will be made to enter the vast field of litigation covering cases of mental anguish.[1] The decisions which involve the question of the recovery of damages for fright may be arranged for discussion into two general classes: (1) Fright as the basis of an action for damages where there is no physical injury either contemporaneous with, or resulting from fright; (2) fright resulting in physical injury.[2] The first will be easily disposed of while the second will command a more detailed discussion.

[1] As to the liability of a telegraph company for mental anguish caused by delay in delivering a telegram, see 2 VA. LAW REV. 457. See also, 1 VA. LAW REV. 88; 4 VA. LAW REV. 67. As to recovery of damages for mental anguish resulting from the wrongful multilation of a dead body, see 2 VA. LAW REV. 285.

[2] Damages recoverable for fright accompanied by a contemporaneous physical injury present merely the ordinary type of personal injury suit and does not warrant a separate division.

There are many wrongs in our jurisprudence which are without redress. The law cannot take cognizance of them because of the inadequacy of the machinery of the courts to properly determine the rights of the litigants. The courts have no means to measure worry, grief, sorrow, humiliation, indignity, injury to ones feelings, and the like. The injury in these cases can not be estimated with a degree of certainty that will warrant recovery; the damages cannot be ascertained or proved. Furthermore, a matter of this kind is too trivial and unimportant to justify the courts being harrassed by the multitude of cases that might arise in this connection. It is within this group of wrongs that the first enumerated class of cases falls, namely, fright without any contemporaneous or resulting physical injury. All the authorities agree that no action will lie.[3] In short, no *legal* damage has resulted from the injury.[4]

Although fright alone is not sufficient to justify an action for damages because incapable of calculation in dollars and cents, it often results in injury of a very definite and certain character. For example, internal injuries, Saint Vitus dance, nervous prostration, insanity and miscarriage are not uncommon results of fright.[5] Here we consider the second class of cases, namely, fright resulting in physical injury. The authorities are far from harmonious and a further classification of this group will simplify the discussion of it: (1) Fright resulting in physical injury caused by the *negligent* act of the party sought to be held liable; (2) fright resulting in physical injury caused by a wilful tort, or gross or wanton negligence. The courts generally seem to have kept this distinction in mind in deciding the cases, and little confusion in the principles involved is here to be found. Some of the authorities, however, make the basis of this distinction a reason for allowing a recovery in the second class and denying it in the first

The correct rule laid down by the courts upholding the right to

[3] Thus, no action will lie for fright due to the failure to provide a safe means for disembarking from a ferry. Southern Pac. Co. *v.* Ammous (Tex. Civ. App.), 26 S. W. 135. See Wyman *v.* Leavitt, 71 Me. 227, 36 Am. Rep. 303.

[4] "Fear taken alone falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can only be proved and measured by physical effects." POLLOCK, TORTS, 6 ed., p. 51. This reason for denying recovery for fright alone seems to have been lost sight of by some courts in considering cases of resulting physical injury.

[5] Nervous shock is distinct from mental anguish and falls within the physiological rather than the psychological branch of the human organism. The nerves and the nerve centers of the body are part of the physical system, and are not only susceptible to lesion from external causes, but also liable to be weakened and destroyed by causes primarily acting upon the mind. Bell *v.* Great Northern R. Co., 26 L. R. Ir. 432; Sloane *v.* Southern Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. "The law is not a metaphysical or philosophical system bound to any *a priori* theory of the nature of the mind or its connection with the body. It takes both as they are found inseparably linked together, the brain and nervous system being part of the physical organism." 1 SEDGWICK, DAMAGES, 9 ed., § 43a.

recover damages for fright resulting in physical injury may be stated as follows: *Damages may be recovered for physical injuries directly caused by fright, which is the proximate result of the defendant's negligence towards the plaintiff.* This proposition is sustained as well on reason and principle as on authority.[6] The physical injury resulting from the negligence may be ascertained and the damages estimated. The injury must be directly caused by the fright and the fright must be the proximate result of the defendant's negligence. So also, the defendant must owe some duty to the plaintiff and this duty must have been violated. The principles governing both the case of negligence and of proximate cause apply here as in any other personal injury suit. The authorities in conflict with the general rule stated are said to support the doctrine of "physical impact." The basis of this doctrine is that there must be some contemporaneous physical impact to warrant recovery.[7] The reasons for this rule seem to be: (1) That since there can be no recovery for fright alone, it follows that there can be no recovery for the consequences of fright. (2) That physical injury resulting from fright is not the proximate result of the negligence. (3) That public policy requires that recovery be denied in cases of this kind.

The first of the reasons given above in support of the doctrine—*i. e.*, since there can be no recovery for fright alone, it necessarily follows that there can be no recovery for the consequences of fright—is clearly unsound. The reasons for refusing to allow a recovery for fright alone do not apply where there is a resulting physical injury. The injury is not a matter of conjecture, nor is it of a trivial nature. The damages are quite as capable of being measured by a jury as they would be if they had ensued from a physical impact. Some of the courts dealing with this matter have considered the physical injury as a mere degree of fright or as matter of aggravation in measuring the extent of the damages; while the fright, they say, is the real basis of the action.[8] While this may be true, these authorities seem to have lost sight of the reason for denying recovery for fright alone, and, in applying the rule to fright resulting in physical injury, have been led to an erroneous conclusion. Fright alone is not actionable, because the alleged deleterious consequences flowing therefrom are impossi-

[6] Dulieu *v.* White, (1901) 2 K. B. 669; Bell *v.* Great N. R. Co., *supra;* Purcell *v.* St. Paul Ry. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Sloane *v.* Southern Cal. Ry. Co., *supra.* For the numerous authorities supporting this proposition, see cases collected in notes, 3 L. R. A. (N. S.) 49; 77 Am. St. Rep. 860; 12 Ann. Cas. 741.

[7] The leading cases upholding the "physical impact" theory are: Ewing *v.* Pittsburg, etc., R. Co., 147 Pa. 40, 23 Atl. 340, 30 Am. St. Rep. 709, 14 L. R. A. 666; Mitchell *v.* Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781; Spade *v.* Lynn & B. R. Co., 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512. For other cases see notes referred to in note 6, *supra.*

[8] See Spade *v.* Lynn, etc., Co., *supra;* Morse *v.* Chesapeake & O. R. Co., 117 Ky. 11, 77 S. W. 361; Mitchell *v.* Rochester R. Co., *supra.*

ble of judicial ascertainment. Where, however, the injury assumes some tangible form, the reason of the rule fails, and so the rule should give way.

The second ground for denying recovery is equally erroneous. It is a general rule of the law of torts that one is liable for all the damages directly or proximately resulting from his negligence. It is equally well settled that he is not liable for remote damages. No single criterion determining the degree of intimacy of cause to effect has been agreed upon by the courts. When the injury is the result of an unintentional wrong, it seems that the courts lean in favor of the defendant and do not seem inclined to extend the principles of liability with the liberality that marks the cases of wilful wrongs, or those based on gross negligence.[10] Whether the fright is directly caused by the negligent act, and the physical injury is the proximate result of the fright is a question for the jury. Each case must be determined on its own facts, and no dogmatic rule which denies this will stand the test of reason or justice. The authorities denying recovery consider the injury as the remote and not the proximate cause. The denial of the right to recover on this ground by some of the decisions is so palpably incorrect as to amount, in effect, to a denial of the rule of approximate cause as applied to physical injuries resulting from fright. Thus, in the recent case of *Mitchell* v. *Rochester R. Co.*,[11] which seems to be considered the leading case in this country upholding the "physical impact" theory, the plaintiff was about to board the defendant's street car when a horse-car of the defendant coming down the street suddenly turned directly upon the plaintiff so that she stood between the horses' heads. A miscarriage resulted from the fright. The New York court, reversing the lower court,[12] denied recovery, on the ground (among others) that the plaintiff's injury did not fall within the rule of proximate cause. The court said it was due to "an accidental or unusual combination of circumstances which could not have been reasonably anticipated, and over which the defendant had no control." The reasoning is illogical, and the decision has been frequently disapproved.[13] The injury was clearly the natural and probable consequence of the negligent act. There was no intervening agent—an unbroken sequence of causation, the fright constituting the connecting link. The ability to foresee the actual and precise form of the injury is immaterial. Nor does it depend on whether an ordinarily prudent man would or ought to have anticipated the result which happened; but it is rather a question whether—if such result or chain of events connecting it with the act complained of had *occurred to his mind*—

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[9] Dulieu *v.* White, *supra;* Purcell *v.* St. Paul R. Co., *supra.*

[10] For full discussion of the principles of approximate cause see 4 VA. LAW REV. 137.

[11] *Supra.*

[12] See the better reasoned opinion of the lower court, 4 Misc. 575, 25 N. Y. Supp. 744.

[13] See Dulieu *v.* White, *supra.*

would the result seem natural and probable according to the ordinary course of events. Remoteness as a ground for denying recovery in any case does not imply a severence in point of time but rather an absence of direct or natural causal sequence.[14]

The rule allowing recovery for fright resulting in physical injury recognizes the fact that there must be negligence chargeable to the defendant. The defendant must have owed a duty to the plaintiff which he violated, and in doing so must have caused legal damages to the plaintiff. There are many cases which appear to be contrary to the rule, but which upon closer examination disclose an absence of negligence, consequently justifying the denial of a recovery.[15] Thus, in *Spade* v. *Lynn & B. R. Co.*,[16] the lack of negligence on the part of the conductor in removing a drunken man from the car is apparent. The Massachusetts court denied damages, stating that there could be no recovery for injury resulting from fright, on the ground of public policy. The ground on which the decision was put was entirely incorrect; since the defendant violated no duty owed to the plaintiff, and recovery

[14] Where the gatekeeper of a railway company had negligently invited the plaintiff to drive over a crossing, dangerous on account of an oncoming train, and, though an actual collision was avoided, the fright occasioned physical injury, the Privy Council held the damages too remote. Victorian Ry. Comm. *v.* Coultas, 13 App. Cas. 222. The court did not commit itself on the "physical impact" theory. The decision hardly seems justifiable on the facts; since the negligent act clearly brought about the fright, which directly resulted in the physical injury. The case has not been followed in England and has been the object of severe criticism. Dulieu *v.* White, *supra.* But see Ward *v.* West Jersey & S. R. Co., 65 N. J. L. 383, 47 Atl. 561. So also, recovery was denied where a woman's life was endangered, due to a negligent collision on a railway, whereby cars were thrown from the tracks against the plaintiff's house, and the plaintiff, who was in the house at the time, suffered physical injury from the fright. Ewing *v.* Pittsburg, etc., R. Co., *supra.* The court said there was no duty to protect the plaintiff from mere fright, which is clearly absurd, considering the fact that there was an actual invasion of another's property. See also, Miller *v.* Baltimore & O. S. W. R. Co., 78 Ohio St. 309, 85 N. E. 499, 125 Am. St. Rep. 699, 18 L. R. A. (N. S.) 949. But see Pankopf *v.* Hinkley, 141 Wis. 146, 123 N. W. 625, 24 L. R. A. (N. S.) 1159.

In Phillips *v.* Dickerson, 85 Ill. 11, 28 Am. Rep. 607, the injury was not the proximate cause and recovery was properly denied. Here it appeared that the fright was occasioned by a quarrel between the defendant and the plaintiff's husband, within the hearing but out of the sight of the plaintiff. The defendant neither knew that the plaintiff heard the quarrel nor of the fact of her condition. The fright resulted in miscarriage, but it was held too remote. Then again, there was no negligence chargeable to the defendant. So also, where a man fired a pistol at a dog on a public highway which greatly frightened a woman, resulting in physical injury, recovery was correctly denied. Renner *v.* Canfield, 36 Minn. 90, 30 N. W. 435. Though the man may have been guilty of a crime the injury was not the proximate result. See also, Braun *v.* Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199.

[15] See Lehman *v.* Brooklyn City R. Co., 47 Hun. (N. Y) 355; Reed *v.* Ford, 129 Ky. 471, 112 S. W. 600, 19 L. R. A. (N. S.) 225; Morse *v.* Chesapeake & O. R. Co., *supra.*

[16] *Supra.*

could properly be denied on that ground. On a second trial the court closed its opinion as follows:

> "The measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another." [17]

Thus, as to the second argument against this rule allowing recovery for physical injury resulting from fright, it may be concluded that each case must be decided according to its own peculiar facts, applying the ordinary rules of approximate cause and negligence.

The third reason for denying recovery—that of public policy—is hardly in accord with either reason or justice.[18] To argue that recovery should be denied because the courts would be overwhelmed with litigation is unreasonable under such circumstances. As has been said, "The argument *ab inconvenienti* is never of much force, and least of all when it is invoked to enable one to avoid a necessary legal conclusion." [19] It is also argued that to allow recovery would open the door to fraud; but damages must be sufficiently proved here as in cases of physical injury caused by physical impact. This question should properly be left to the jury. Physical injuries resulting from physical impact are not infrequently feigned, and in such a case no one would suggest the denial of recovery on the ground of public policy. It has always been a difficult thing to estimate personal injuries in dollars and cents; but the problem is no more difficult in cases of physical injury resulting from fright than is it when a physical impact accompanies the fright.[20] To enforce a rule denying recovery is merely to deprive an injured person of a right without due regard to the principles of reason and justice.

It seems that the courts clinging to this idea of physical impact make use of the slightest physical contact to justify a recovery and so bring the case within the rule.[21] Thus, recovery for injury resulting from fright was sustained by reason of the fact that the plaintiff was slightly thrown against the seat of the car.[22] It is very difficult to see how a mere additional blow or slight contact accompanying the fright will alter the situation very mate-

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[17] 172 Mass. 488.

[18] Ewing *v.* Pittsburg, etc., R. Co., *supra;* Mitchell *v.* Rochester R. Co., *supra.*

[19] Mitchell *v.* Rochester R. Co., 4 Misc. 581, 25 N. Y. Supp. 744.

[20] See Dulieu *v.* White, *supra.*

[21] See Canning *v.* Williamstown, 1 Cush. (Mass.) 451; Warren *v.* Boston & M. R., 163 Mass. 484, 40 N. E. 895; Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100; Porter *v.* Delaware, etc., R. Co., 73 N. J. L. 405, 63 Atl. 860.

[22] Homans *v.* Boston Elev. Ry. Co., 180 Mass. 456, 62 N. E. 737, 91 Am. St. Rep. 324, 57 L. R. A. 291. So is was held that where a car through negligence struck the plaintiff's wagon and carried it a short distance, and the plaintiff suffered physical injury from the fright, there was sufficient impact to warrant recovery. Consolidated Traction Co. *v.* Lambertson, *supra.*

rially. The arguments against recovery for fright resulting in physical injury apply with equal force. So also, the courts hold that if one is put in danger or peril of life, and, in attempting to escape, suffers an injury from the fright, recovery may be had. This was the decision where a woman threw herself on the platform of a station to avoid being struck by a piece of timber projecting from a passing train.[23] If one is put in apparently imminent danger through the negligence of another and becomes so frightened as to be unable to jump from his carriage and later suffers physical injury as a direct result of the fright, though there was no contact at the time; it would be quite illogical to deny recovery in such a case, but say that if he had jumped from his carriage in consequence of his fright and suffered physical injury, a recovery could be sustained.[24] In all these cases there is the same injury caused by the same negligence; and to deny recovery on the mere ground of lack of contemporaneous physical impact cannot be upheld on principle.[25]

As said by some authorities, there is one limitation upon the rule of recovery for fright and its consequences, and that is that the fright must be caused by fear of personal injury to the plaintiff himself. Thus, if the fright is due to fear of injury to another no recovery can be had.[26] Though this is generally true, it is not a limitation on the general rule as stated, but is merely the result of the application of the general rule to the particular facts. Negligence necessary to warrant recovery must be a breach of a duty owed to the party complaining. And, again, the damages may be and usually are too remote when fear is caused by danger to another. Nevertheless, if there can be proved negligence toward the plaintiff and legal damages resulting proximately from the fright, then recovery should follow. Proof under such circumstances is indeed difficult and recovery is rare. Thus, a person was denied damages for physical injury resulting from fright caused by the negligence of the defendant carrier in placing her daughter in iminent danger while attempting to board the defendant's train.[27] There was no duty owed to the plaintiff and the injury to the plaintiff was too remote. Cases of this kind

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[23] Buchanan *v.* West Jersey R. Co., 52 N. J. L. 265, 19 Atl. 254.

[24] See Berard *v.* Boston & A. R. Co., 177 Mass. 179, 58 N. E. 586; Warren *v.* Boston & M. R., *supra.* See also, Jones *v.* Brooklyn H. R. Co., 23 App. Div. 141, 48 N. Y. Supp. 914, distinguishing Mitchell *v.* Rochester R. Co., *supra.*

[25] See Dulieu *v.* White, *supra;* Kimberly *v.* Howland, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545.

[26] When a contemporaneous physical injury is not necessary to obtain recovery, it would seem that an injury or threatened injury to property which causes fright and subsequent physical injury, and which is the proximate result of the defendant's negligence toward the plaintiff, would warrant an action for damages.

[27] Cleveland C. C. & St. L. R. Co. *v.* Stewart, 24 Ind. App. 374, 56 N. E. 917. See also, Mahoney *v.* Dankwart, 108 Iowa 321, 79 N. W. 134.

have often arisen when children have been placed in danger, *e. g.*, in wrongfully putting them off a train, thereby causing fright and injury to the mother.[28] So in the case of using abusive and threatening language to the plaintiff's husband.[29] But it may be mentioned that in many of these cases, as in the other cases of proximate cause illustrated above,[30] the decision has not been placed upon the specific ground of the absence of negligence toward plaintiff, or that the injury is too remote; but have attempted to apply the "physical impact" theory, thus opening the decision to the same criticism due that doctrine.[31]

We may now consider the second class of cases, where fright resulting in physical injury is caused by some wilful or grossly negligent act. Here the authorities are agreed that recovery may be had whether there is a contemporaneous physical injury or not. The defendant is liable for all the damages resulting from his act, and the courts do not hesitate to favor the plaintiff in determining the proximate cause. Thus, where one enters the house of the plaintiff and there displays a whip and makes threatening remarks to the plaintiff, fright and resulting injury may be made the basis of recovery.[32]

We are now confronted with a somewhat unique situation. In the recent case of *Alabama Fuel & Iron Co.* v. *Belandoni* (Ala.), 73 South. 205, the Court of Appeals of Alabama allowed damages for physical injury resulting from fright due to the defendant's tortious act in putting another in imminent danger of life. The defendant, seated on his horse, talking to the plaintiff's wife, who was on the porch of her house, fired a pistol at the plaintiff's dog which was on the premises a few feet away. The plaintiff's daughter, a very young child, was standing near the dog. The wife, who was *enceinte,* was so upset and unnerved that she suffered a miscarriage. As we saw above, generally, the plaintiff herself must be the one placed in danger of personal injury, that is, the fright must arise from danger to oneself. There must be negligence—a violation of a duty owed to the plaintiff—and the legal damages must be the proximate result. But we also saw that the authorities are agreed that recovery may be had for the results

[28] Sanderson *v.* Northern P. R. Co., 88 Minn. 162, 92 N. W. 542, 97 Am. St. Rep. 509, 60 L. R. A. 403.

[29] Bucknam *v.* Great N. R. Co., 76 Minn. 373, 79 N. W. 98.

[30] See note 14, *supra.*

[31] For example, see Cleveland C. C. & St. L. R. Co. *v.* Stewart, *supra.*

[32] Brownback *v.* Frailey, 78 Ill. App. 262. See Watson *v.* Dilts, 116 Iowa 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559; Newell *v.* Whitcher, 53 Vt. 589, 38 Am. Rep. 703; Williams *v.* Underhill, 63 App. Div. 223, 71 N. Y. Supp. 291. And it would seem that the same should be held in White *v.* Sander, 168 Mass. 296. Spade *v.* Lynn, etc., Co., *supra,* recognized the right of recovery in this class of cases. But in Smith *v.* Postal Tel. & Cable Co., 174 Mass. 576, 55 N. E. 380, 75 Am. St. Rep. 374, 47 L. R. A. 323, the court said that since no recovery could be had for mere fright without any contemporaneous physical injury, the conclusion could not be avoided by calling the negligence gross.

of a wilful tort or a grossly negligent act. In the case mentioned we deal with a combination of these two principles. The act was a wilful tort committed on the plaintiff's premises and was a grossly negligent act in itself. And, considering all the circumstances, there was clearly a violation of a duty owed to the plaintiff. The damage or miscarriage was the direct consequence of an unbroken line of causation, and, in accordance with the general rule stated above, recovery was properly allowed. Though there are no cases exactly in point, it is believed to be the correct conclusion, both on reason and principle, and by the analogies of the law.[33]

DEVICES TO PREVENT OR CONFER JURISDICTION UPON THE FEDERAL COURTS.—It is well recognized that devices to confer jurisdiction upon federal courts for the purpose of removal or otherwise are forbidden by law. Section 37 of the Judicial Code provides in substance that attempts to confer jurisdiction by pretended changes of citizenship or residence, colorable assignments, or improper arrangement of parties will cause the suit to be dismissed by the federal court, or to be remanded to the state court from which it was removed, *ex mero motu*. This statute is intended to prevent attempts to confer upon the federal courts jurisdiction not given them by law.

Pretended changes of citizenship for the purpose of acquiring a right to sue in the federal courts constitute a fraud on the federal jurisdiction, and when discovered the courts will refuse to take cognizance of the case.[1] When the change of domicil is actual and bona fide and is accompanied by an intention to remain permanently, jurisdiction is conferred upon the federal courts; and this is true in spite of the fact that the change of domicil was made with the express purpose of conferring that jurisdiction.[2]

The same principle applies to transfers of choses in action. If the assignment of the claim is actual and bona fide, leaving no interest whatsoever in the assignor, the federal court will have jurisdiction, which will not be defeated by the motive of the parties in making or accepting the assignment.[3] But where the assign-

[33] In Hutchenson *v.* Stern, 115 App. Div. 791, 101 N. Y. Supp. 145, the plaintiff was denied recovery (two of the five judges dissenting) for the loss of his wife's services on account of premature birth of a child caused by fright as a result of an assault upon the plaintiff by the defendant in the wife's presence. Recovery was allowed for miscarriage produced by fright occasioned by a violent assault upon some negroes on the plaintiff's premises and in her presence. Hill *v.* Kimball, *supra*. See Gulf, etc., Ry. Co. *v.* Hayter (Tex. Civ. App.), 55 S. W. 128. See also, Preiser *v.* Weilandt, 448 App. Div. 569, 62 N. Y. Supp. 890; Watson *v.* Dilts, *supra*.

[1] Morris *v.* Gilmer, 129 U. S. 315.

[2] Warax *v.* Cincinnati, etc., Co., 72 Fed. 637.

[3] Blair *v.* Chicago, 201 U. S. 400.